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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY E. MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A05-0802-CR-86
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0601-FA-372

August 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Anthony E. Miller appeals his sentence following his convictions for three counts of Child Molesting, each as a Class A felony, after a jury trial. Miller raises a single issue for our review, which we restate as the following two issues:

1. Whether the trial court abused its discretion in sentencing Miller.

2. Whether Miller's sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

In the summer of 2005, thirty-nine-year-old Miller approached eleven-year-old A.L. in a theater in Terre Haute. A.L. is autistic. Miller told A.L. to meet him at a nearby park at 1:00 p.m. the next day for a "surprise." Transcript at 34.

The next day, A.L. met Miller at the park. Miller invited A.L. into his truck and began discussing "adolescence and puberty." Id. at 37. Miller rubbed A.L.'s genitals outside of A.L.'s clothing, then Miller stopped the truck in a wooded area, removed his pants, and had A.L. perform oral sex on him. Afterwards, Miller told A.L. to meet him again in a week or two, and to not tell anyone because "it was normal and . . . it shouldn't matter." Id. at 40.

About two weeks later, Miller again met with A.L. at the park. Miller again had A.L. perform oral sex on him, and Miller masturbated A.L. Miller then told A.L. to return to the park in a week, which A.L. did. After that meeting, Miller and A.L. met at the Hendrich Title Company, where Miller worked, and Miller molested A.L. again. Miller molested A.L. on seven or eight different occasions at Hendrich Title Company.

Each act was done in the building's basement, and each time Miller and A.L. engaged in oral sex. Miller also engaged A.L. in oral sex at a cemetery and at a baseball field. When Miller would molest A.L. in Miller's truck, Miller would "wipe himself up" with "a napkin [or] paper towel" that Miller kept "behind his seat." Id. at 60.

In late December or early January, after Miller had molested A.L. at the baseball field, Miller took A.L. to Blockbuster Video. A.L. went inside and purchased a movie while Miller waited in his truck. Miller then dropped A.L. off near the home of A.L.'s mother. After A.L. watched the movie, his mother began asking him questions about how A.L. obtained the movie. A.L. then told his mother about Miller, and A.L.'s mother called the police.

On January 31, 2006, the State charged Miller with three counts of child molesting, each as a Class A felony. A.L. testified against Miller at the ensuing jury trial. And, without objection, the State introduced DNA evidence confirming the existence of both Miller's sperm and A.L.'s sperm on napkins located on the floorboard of Miller's truck and on the carpet in the basement of the Hendrich Title Company building. The jury found Miller guilty on all three counts.

On January 22, 2008, the trial court sentenced Miller. In its sentencing order, the court stated, in relevant part, as follows:

> The Court having heard the evidence now finds that the victim was mentally or physically infirm; the nature of the circumstances of the crimes, and the impact it has [sic] had on the victim and those are aggravating circumstances. The Court finds that Defendant's lack of criminal history is a mitigating circumstance. The Court finds that the aggravating circumstances outweigh the mitigating circumstances.

Appellant's App. at 25. The court then sentenced Miller to thirty-five years executed for each conviction, with each sentence to run concurrently. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Abuse of Discretion

Miller first argues that the trial court abused its discretion in sentencing him. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Id. (quotation omitted).

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91. Further, "the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence." Id. at 491.

As an initial matter, we emphasize that, Miller's arguments to the contrary notwithstanding, the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004), does not apply here. Indiana's advisory sentencing scheme, which

undoubtedly applies to Miller, was "enacted to resolve the Sixth Amendment problem Blakely presented." Anglemyer, 868 N.E.2d at 489.

> By eliminating fixed terms, the Legislature created a regime in which there is no longer a maximum sentence a judge "may impose without any additional findings." Blakely, 542 U.S. at 304 (emphasis omitted). And this is so because for Blakely purposes the maximum sentence is now the upper statutory limit. As a result, even with judicial findings of aggravating circumstances, it is now impossible to "increase[] the penalty for a crime beyond the prescribed statutory maximum." Blakely, 542 U.S. at 301 (quoting Apprendi[v. New Jersey, 530 U.S. 466, 490 (2000)]).

Id. Accordingly, Miller's arguments that "Blakely . . . applies in this instance," or that the trial court erred in relying on evidence not "found and determined beyond a reasonable doubt by a jury," are without merit.[1] See Appellant's Brief at 13.

Miller also argues that the trial court abused its discretion by relying on aggravators that are unsupported by the record. We cannot agree. The court relied on three aggravators: (1) A.L.'s mental infirmity; (2) the nature and circumstances of Miller's crimes; and (3) the impact of Miller's actions on A.L.

Each of those aggravators is supported in the record. First, A.L. testified that he was autistic, and the trial court could infer from its observations of A.L. whether A.L. was mentally infirm. See Oberst v. State, 748 N.E.2d 870, 878-79 (Ind. Ct. App. 2001), trans. denied. Second, the nature and circumstances of the crimes here is a valid aggravator because Miller's molestations of A.L. were not isolated. Rather, they were

[1] Likewise, insofar as Miller asserts that the trial court abused its discretion in the weighing or balancing of the aggravators or mitigators, we note that that argument is no longer subject to appellate review. See Anglemyer, 868 N.E.2d at 491.

part of a series of molestations.[2] See Plummer v. State, 851 N.E.2d 387, 390-91 (Ind. Ct. App. 2006) (holding that evidence of "a series of molestations" supports the aggravating circumstance of the nature and circumstances of the crimes). And, finally, A.L.'s mother provided the court with a victim's impact statement, in which she noted that A.L. is receiving counseling, but he continues to lack "self esteem, self worth, his pride, dignity and . . . spirit." Appellant's App. at 34. The trial court did not err in considering that evidence.

Last, Miller asserts that the trial court abused its discretion by not considering more of the allegedly mitigating evidence he presented to the court. Specifically, Miller notes that he "was a lifelong resident of Vigo County," he has "been very involved in the community providing volunteer services for 17 years with the Optimist Club,"[3] he "has been employed his entire adult life," he is a high school graduate "having been ranked in the top 15% of his high school class,"[4] he "has no psychiatric history," his "physical

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[2] Miller's comparison of his case to that of the defendant in Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2000), trans. denied, is misplaced. In Kien, we noted:

> A fact which comprises a material element of a crime may not also be used as an aggravating circumstance to support an enhanced sentence. Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988). Here, Kien was charged with three counts of child molesting. Evidence was presented which indicated that Kien committed only three acts of child molesting. Therefore, Kien was convicted for each act which was alleged. The trial court should not have considered that several acts of molestation were committed when Kien was convicted of each act.

782 N.E.2d at 411. Here, unlike in Kien, the evidence shows that Miller committed at least twelve separate acts of molestation of A.L. but that Miller was charged with and convicted of only three acts.

[3] Miller did testify that he had been a member of the Terre Haute Noon Optimist's Club for seventeen years. Regarding his community service, however, the only evidence in favor of Miller is his testimony that, once a year, the Optimist's Club would have "a gathering in the park," for which Miller would cook and clean.

[4] Miller graduated from high school ranked 29 out of 175 students.

condition is good," and he "does not drink and has never used illegal drugs." Appellant's Brief at 10-11. But the trial court was free to disregard mitigating factors it did not find to be significant. See Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). And Miller carries the burden on appeal of showing that such a disregarded mitigator is significant. See id. Miller has not met that burden here. The court did not abuse its discretion in sentencing Miller.

Issue Two: Appellate Rule 7(B)

Miller also argues that his sentence is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration in original).

Before addressing the nature of Miller's offenses and his character, we first consider whether his case is factually similar to that of the (unrelated) defendant in Miller v. State, 884 N.E.2d 922 (Ind. Ct. App. 2008), modified on other grounds on reh'g, 2008 Ind. App. LEXIS 1527 (July 22, 2008), trans. pending. The defendant in Miller received a thirty-year aggregate sentence, with ten years suspended, after he was convicted on one count of child molesting, as a Class A felony, and two counts of child molesting, each as a Class C felony. The Miller defendant's crimes occurred over the course of three or four weeks, and the defendant pleaded guilty to the Class C felonies. During sentencing, the trial court in Miller found seven mitigating circumstances, including the defendant's remorse and voluntary counseling, that were only "slightly" outweighed by the found aggravators. On appeal, we held that the defendant's sentence was not inappropriate.

The facts of the case here are markedly different from the facts in Miller. Here, Miller's acts of molesting A.L. occurred over the course of seven months, from June of 2005 through December of 2005, not over the course of one month. Miller did not plead guilty to any of his crimes, and instead maintained his innocence throughout his trial and sentencing. Miller faced a potential maximum sentence of 150 years for three Class A felony convictions. And, as discussed above, Miller has not demonstrated any mitigators of significance, other than his lack of criminal history. Accordingly, we are not persuaded that Miller is persuasive authority on these facts.

Miller's thirty-five year aggregate sentence is not inappropriate. With respect to the nature of the offenses, again, Miller preyed on a mentally infirm child and molested him at least twelve times over the course of seven months. As a result, A.L. has suffered

and continues to suffer from psychological and emotional trauma. Nor does Miller's character warrant revision of his sentence. While it is true that Miller has no prior criminal history, the trial court took that into account in imposing concurrent thirty-five-year terms. And, like the trial court, we are not persuaded that any other aspects of Miller's character merit serious consideration in his favor. Accordingly, we affirm Miller's sentence.

Conclusion

The trial court did not abuse its discretion in ordering Miller to serve concurrent thirty-five-year sentences. Nor is Miller's sentence inappropriate. Hence, we affirm the trial court's sentencing order.

Affirmed.

MAY, J., and ROBB, J., concur.